COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 16-1888F

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36, ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL	))))))

MEMORANDUM OF EXXON MOBIL CORPORATION IN SUPPORT OF ITS EMERGENCY MOTION TO EXTEND THE TIME TO MEET AND CONFER WITH THE ATTORNEY GENERAL UNDER G.L. c. 93A, § 4

INTRODUCTION

After more than three years of inaction, the Attorney General now threatens Exxon Mobil Corporation ("ExxonMobil") with a lawsuit mere days before a trial against the New York Attorney General is set to begin. The timing of the Attorney General's threat is no coincidence. It is an intentional and cynically transparent ploy to distract ExxonMobil from its trial preparations, gain some trial-related media attention for itself, and assist a fellow member of the attorney-general coalition that announced a campaign against ExxonMobil in 2016. It is also contrary to the rule of law. Massachusetts law directs the Attorney General to provide potential defendants an opportunity to present their side of the case, in person, before the State files a lawsuit against them. The Attorney General has ignored that requirement here by insisting that ExxonMobil either meet with the Attorney General two or three business days before the first day of trial or else forfeit the statutory protection of a meet and confer. The Attorney General's intentional maneuvering renders completely worthless ExxonMobil's statutory right to meet and confer. It is a plain and simple abuse of power and a denial of due process.

The Attorney General has known for months of the upcoming trial in New York and that

ExxonMobil's in-house and outside counsel were focused on preparing for it. Earlier this year, the Attorney General attempted to derail trial preparations by insisting that oral argument in a related case take place a week before the New York trial. The Attorney General held firm to that argument date even after counsel for ExxonMobil explained the conflict. The court agreed with ExxonMobil and did not schedule argument a week before trial, but the Attorney General appears to have been undeterred in its desire to disrupt and distract.

The threatened lawsuit is simply the latest gambit. Even though the Attorney General has not obtained a single document from ExxonMobil, has not interviewed a single ExxonMobil witness, and has not had a substantive conversation with ExxonMobil's counsel in years, it now claims it cannot wait until mid-November to file a civil action against the company. There is no legitimate reason for this rush to judgment. As the Court knows, a tolling agreement has been in place for three years that provides full protection to the Attorney General, and ExxonMobil has not sought to modify, alter, or do anything other than live up to its end of the agreement. The Attorney General's race to the court house has nothing to do with the sound administration of justice or the rule of law. It has everything to do with gamesmanship and unfairness that is unworthy of the chief legal officer for the Commonwealth.

That is why ExxonMobil has filed an emergency motion asking the Court to extend the time to meet and confer until a date after the conclusion of the New York trial. This short extension would preserve ExxonMobil's statutory right to exercise its opportunity to meaningfully meet and confer with the Attorney General in person about the threatened lawsuit. The requested relief would not prejudice the Attorney General or the Commonwealth because any possible claims that they may assert against ExxonMobil are preserved by a tolling agreement between the parties. It would also vindicate the text and purpose of the statute, which provides an opportunity to meet

with state officials before the power of the state is brought to bear on a defendant. The rule of law requires no less.

FACTUAL BACKGROUND

A. The Attorney General Leads a Coalition of State Officials Targeting ExxonMobil.

The Attorney General has publicly aligned herself with a coordinated campaign of partisan attorneys general dedicated to "creatively" and "aggressively" using their law enforcement powers to "limit[] climate change" and "ensur[e] the dissemination of accurate information about climate change."[1] This campaign first exposed itself to the public on March 29, 2016, when New York Attorney General Eric Schneiderman hosted a press conference in New York City with a coalition of state attorneys general, self-styled as the "AGs United for Clean Power" and the "Green 20." He was joined by Attorney General Maura Healey, who attributed the public's failure to embrace her climate change policies to speech that caused "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts."[2] Attorney General Healey asserted that those who purportedly "deceived" the public—by disagreeing with her about climate change policy—"should be, must be, held accountable."[3] In the next breath, Attorney General Healey declared that she too had "joined in investigating the practices of ExxonMobil." She then promised "quick, aggressive action" to "hold[] accountable those who have needed to be held accountable for far too long."[4]

The March 2016 press conference was years in the making. Private interests have long urged state officials to misuse their law-enforcement power to restrict disfavored viewpoints on climate change. And they were on hand at the press conference, leading workshops attended by

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1 June 16, 2016 App'x in Support of ExxonMobil's Motion, Ex. A at App. 003.
2 *Id.* at App. 013.
3 *Id.*
4 *Id.* at App. 014.

both Attorney General Healey and others, that were meant to be concealed from the public. During one of those secret meetings, Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists, delivered a presentation to the attorneys general on the "imperative of taking action now on climate change."[5] Matthew Pawa, a global warming plaintiff's lawyer, who unsuccessfully sued ExxonMobil for allegedly causing global warming also delivered a secret presentation on "climate change litigation."[6]

For years, these activists and other private interests have worked to persuade state law enforcement officers to use their investigative powers to apply pressure those perceived to hold disfavored views on climate change. For example, in 2012, both Frumhoff and Pawa attended a workshop in La Jolla, California, which examined ways to obtain the internal documents of companies like ExxonMobil for the purpose of "maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." (Ex. 1 at 27.) Recognizing the broad power of state attorneys general, the La Jolla participants observed that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light." (*Id.* at 11.) Frumhoff began to put that agenda into action by July 2015, when he assured fellow activists that he was exploring "state-based approaches to holding fossil fuel companies legally accountable" and anticipated "a strong basis for encouraging state (e.g., AG) action forward."[7]

The Rockefeller Family Fund (the "Fund") also helped to devise the playbook Attorney General Healey and others have followed for their investigations. In January 2016, the Fund

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5 June 16, 2016 App'x in Support of ExxonMobil's Motion, Ex. M. at App. 133.

6 *Id.*

7 Michael Bastasch, *Emails: Eco-Activists Plotted Oil Industry Lawsuits Before Anti-Exxon Stories Released*, Daily Caller (May 16, 2016), http://dailycaller.com/2016/05/16/emails-eco-activists-plotted-oil-industry-lawsuits-before-anti-exxon-stories-released/.

convened a meeting to discuss the "Goals of an Exxon campaign" such as "[t]o establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm" and "[t]o delegitimize [ExxonMobil] as a political actor." (Ex. 2.) In December 2016, the President and Director of the Fund admitted, after initially failing to disclose the connection, that the Fund had financed the so-called investigative journalism that Attorney General Healey claims inspired her investigation. *See City of San Francisco* v. *Exxon Mobil Corp.*, No. 096-297222-18, 2018 Tex. Dist. LEXIS 1 (Tarrant Cty. Tex. Apr. 24, 2018) (Ex. 3).

B. ExxonMobil and the Attorney General Entered into a Tolling Agreement.

Fewer than three weeks after the press conference, on April 19, 2016, the Attorney General issued a Civil Investigative Demand ("CID") to ExxonMobil seeking over 40 years of records pertaining to speech and research on climate change. According to the CID, the Attorney General's investigation centered on two types of transactions: (1) ExxonMobil's marketing and sale of energy and other fossil fuel derived products to consumers in Massachusetts, and (2) ExxonMobil's marketing and sale of securities to Massachusetts investors. After receiving the CID, ExxonMobil engaged in negotiations with the Attorney General to address its concerns relating to the CID. Those discussions were unsuccessful.

On June 15, 2016, ExxonMobil filed a complaint and a motion for a preliminary injunction in the United States District Court for the Northern District of Texas against the Attorney General, alleging the CID violated its rights under state and federal law (the "Federal Court Challenge"). The next day, ExxonMobil filed an Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order ("Motion to Set Aside the CID") in this Court, and the Attorney General responded with a cross-motion to compel compliance.

Shortly after ExxonMobil filed the two legal actions, the Attorney General suggested the parties enter into a tolling agreement regarding the CID. On June 24, 2016, the parties executed a tolling agreement whereby the Attorney General agreed it would not seek to enforce ExxonMobil's compliance with the CID until both the Federal Court Challenge and the Massachusetts State Court Challenge before this Court were fully adjudicated, including through appeal (the "Tolling Agreement"). (Ex. 4.) The parties further agreed that "any time limit for the assertion of any claims arising from the Investigation that have not expired as of the Effective Date . . . be tolled and postponed." *Id.* Given the terms of the Tolling Agreement, ExxonMobil has not produced any documents to the Attorney General in response to the CID; nor have any ExxonMobil employees or former employees testified before the Attorney General, as requested by the CID.

On January 11, 2017, the Court denied ExxonMobil's Motion to Set Aside the CID and allowed the Attorney General's cross-motion to compel compliance. The Court also ordered the parties to "submit a joint status report to the court no later than February 15, 2017, outlining the results of a Rule 9C conference." Pursuant to the Court's order, the parties filed a Joint Status Report on February 14, 2017. (Feb. 14, 2017, Joint Status Report.) In the Joint Status Report, the parties advised the Court that they had entered into the Tolling Agreement and explained its key terms.

The parties have continued to file status reports to apprise the Court of developments in this case as well as pending, related cases. For example, on August 22, 2018, the Attorney General filed a Status Report again advising the Court that under the terms of the Tolling Agreement, ExxonMobil was not obligated to produce responsive documents until the pending litigation in Massachusetts and the then-pending litigation in federal court in Texas were fully resolved. (Aug. 22, 2018 MAAG Status Report.) In that Status Report, the Attorney General further informed the

Court that the Federal Court Challenge was transferred to the Southern District of New York. (*Id.*) And on September 5, 2018, ExxonMobil filed a Status Report informing it of recent developments in related actions, also referencing the parties' Tolling Agreement and noting that both actions remain unresolved and at the appellate level. (Sept. 5, 2018 ExxonMobil Status Report.)

In January 2019, the Court sent notice to the parties regarding the possible scheduling of a status conference. In separate submissions, the parties took different positions on whether a status conference was necessary at that time. On January 14, 2019, ExxonMobil sent a letter to the Court proposing "that a status conference be adjourned at this time in light of the tolling agreement between the parties." (Jan. 14, 2019 ExxonMobil Letter.) ExxonMobil explained that the federal litigation was still pending, and "judicial economy and the interests of justice would be best served by holding a status conference only after the federal case has been resolved." (*Id.*) The Attorney General disagreed, suggesting that holding a status conference to discuss the litigation would be constructive. (Jan. 15, 2016 MAAG Letter.) Once again, the Attorney General reiterated the terms of the Tolling Agreement and acknowledged that the federal litigation was still pending on appeal before the United States Court of Appeals for the Second Circuit. (*Id.*)

On January 18, 2019, the Court agreed with ExxonMobil's position and decided to hold a status conference after the conclusion of the federal appellate litigation. The Court ordered, "In view of the parties' Tolling Agreement, Counsel shall contact the Assistant Clerk at the conclusion of the Federal Appellate litigation to schedule a status conference in this matter[.]"

C. A Related New York Action Is Moving Toward Trial on an Expedited Basis.

As noted, the Federal Court Challenge was transferred to the Southern District of New York. That case currently is pending appeal before the Second Circuit and has been fully briefed. On July 15, 2019, the Second Circuit proposed to calendar the case for oral argument during the

week of October 15, 2019. ExxonMobil's counsel notified the Court that the week of October 15 "presents a conflict because of a multi-week trial beginning on October 23 where both ExxonMobil and the New York Attorney General's Office are parties" and counsel would be "busy preparing for that trial along with the rest of Exxon's team the prior week." Due to the expected duration of the trial, ExxonMobil's counsel asked the Court to postpone argument until the week of December 2, 2019 or later.

The Attorney General, a party in the case, vehemently objected to ExxonMobil's proposed date, insisting that the argument be scheduled during the week of October 15. (Ex. 8.) In a written submission to the Court on July 26, 2019, the Attorney General discussed its knowledge of ExxonMobil's upcoming trial on October 23 and ExxonMobil's intense preparation for that trial during the prior week. (*Id.*) The Second Circuit has not yet scheduled the date for oral argument thereby implicitly rejecting the Attorney General's attempt to force the argument to occur during the week before the trial in the New York State action.

The New York State action involves securities fraud claims brought by the New York Attorney General against ExxonMobil. In August 2018, Justice Ostrager placed this case on an expedited basis by ordering the Attorney General to either close the investigation or "bring a formal complaint" that would result in a "2019 trial." (Aug. 28, 2019 Hr'g Tr. 16:11–15, 20:4–6, *People* v. *PricewaterhouseCoopers LLP*, Index No. 451962/2016 (NY Sup. Ct.).) Shortly thereafter, Justice Ostrager scheduled trial for October 23, 2019, one year from the date the Attorney General filed her complaint. (Prelim. Conference Order at 3, *People* v. *Exxon Mobil Corp.*, Index No. 452044/2018 (NY Sup. Ct. Nov. 15, 2018), Dkt. No 45. The trial is scheduled to begin next week on October 22, 2019 and conclude on conclude on or about November 12, 2019. As indicated by its written submission to the Second Circuit in July 2019, the Attorney

General has known for months about this looming trial date. (Ex. 8.)

D. The Attorney General Provided Pre-Suit Notice to ExxonMobil on the Eve of the New York Trial.

On October 10, 2019—less than two weeks before the commencement of the trial in the New York State action—the Attorney General served notice of its intent to file suit against ExxonMobil under G.L. c. 93A, § 2 (the "Notice"). (Ex. 5.) The Attorney General also offered, as required by law, that representatives of its Office were available to confer with ExxonMobil prior to the filing of the action. As a precondition to filing suit, Section 4 of the statute requires the Attorney General to provide a possible defendant with the opportunity to confer with the Attorney General in person at least five days before the commencement of any action. G.L. c. 93A, § 4.

On October 14, 2019, ExxonMobil responded stating its position that the Notice circumvents the letter and spirit of the Tolling Agreement and constitutes a breach of the Tolling Agreement. (Ex. 6.) In addition, ExxonMobil expressed concern that the Attorney General intends to sue even though it has not reviewed a single document from ExxonMobil or interviewed a single ExxonMobil employee. (*Id.* at 2.) ExxonMobil further identified the highly suspect timing of the Attorney General's Notice—the Notice was sent on the eve of trial in the New York State action. Nevertheless, ExxonMobil accepted the Attorney General's offer to meet and confer and proposed to do so following the conclusion of the New York action in mid-November. On October 15, 2019, the Attorney General replied, rejecting ExxonMobil's request to meet and confer after the trial in the New York State action. (Ex. 7 at 2.) Instead, the Attorney General stated that it will confer with ExxonMobil on October 16 or 17. (*Id.*)

In view of the Attorney General's insistence that any meet and confer occur immediately and not following the imminent trial, ExxonMobil has filed this emergency motion requesting this

Court to extend the time to meet and confer under c. 93A, § 4 to a date following the conclusion of the trial in the New York State action on or about November 12, 2019.

ARGUMENT

Under Section 4 of G.L. c. 93A, the Attorney General is required to give notice to a potential defendant prior to filing a lawsuit: "At least five days prior to the commencement of any action brought under this section, except when a temporary restraining order is sought, the attorney general shall notify the person of his intended action, and *give the person an opportunity to confer with the attorney general* in person or by counsel or other representative as to the proposed action." G.L. c. 93A, § 4 (emphasis added). Section 4's "opportunity to confer" is not a mere formality. *Id.* It affords the parties a *meaningful* opportunity to address, and potentially narrow, legal and factual issues as well as engage in discussions regarding the merits of the claims and a possible resolution. Indeed, Section 5 expressly contemplates that "where the attorney general has authority to institute an action or proceeding under section four, *in lieu thereof* he may accept an assurance of discontinuance of any method, act or practice in violation of this chapter." G.L. c. 93A, § 5 (emphasis added).

A meaningful opportunity to confer, such that the matter could be resolved, is also reflected in G.L. c. 93A, § 9. In private actions brought by consumers under Section 9(3), the consumer must send a written demand for relief before filing suit. The function of this demand letter is "to encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful conduct." *Slaney* v. *Westwood Auto, Inc.*, 366 Mass. 688, 705 (1975). It also "gives the addressee an opportunity to review the facts and the law involved to see if the requested relief should be granted or denied." *Id.*

Months before sending its Notice, the Attorney General knew of the October 22, 2019 trial

date and that ExxonMobil and its attorneys would be fully engaged in intense trial preparation during the period preceding the trial. (Ex. 8 at 2.) Nevertheless, the Attorney General made a tactical decision to serve the Notice on the eve of trial despite claiming that it had already obtained "sufficient grounds" to bring suit over the past three and one-half years. (Ex. 7.) The timing of the Notice—which affords a brief five-day period for the parties to confer—plainly indicates the Attorney General's intent to disrupt and disturb ExxonMobil's trial preparation and benefit the New York Attorney General's Office, its co-defendant in the federal case. In fact, this is the second time that the Attorney General has attempted to interfere with ExxonMobil's trial preparation. The first instance was when the Attorney General insisted that the oral argument before the Second Circuit occur during the week of October 15. (Ex. 8.) It is evident that this also is a transparent media ploy, in which the Attorney General intends to file suit and pile on the news coverage of the high-profile trial.

Aside from the timing of the Notice, the Attorney General's decision to bring an action in the first place is highly suspect given its complete lack of communication with ExxonMobil over the past several years. ExxonMobil has not had a substantive conversation about the Attorney General's investigation or potential claims in three years. The Attorney General has not interviewed a single employee of ExxonMobil or reviewed a single document from ExxonMobil. Its determination to race to the courthouse without information from ExxonMobil or a meaningful meet and confer with the Company further evinces the improper motive here.

The statute's guarantee of a meaningful opportunity to confer would enable ExxonMobil and its counsel to discuss the proposed claims and supporting evidence with the Attorney General. ExxonMobil and its counsel would then be in a position to conduct internal discussions regarding the basis of the alleged claims and defenses, and to make a reasoned business decision whether to

attempt to resolve the matter or engage in litigation.

Moreover, Section 4 explicitly affords a potential defendant with the option to *"confer with the attorney general in person"* as to the proposed action. ExxonMobil has previously met with the Attorney General in person and intends to do so in this instance. Given the timing of the Attorney General's Notice, an in-person meeting is now virtually impossible. As the Attorney General is well aware—as evidenced by its letter to the Second Circuit last July—ExxonMobil's trial counsel "would be busy preparing for that trial along with the rest of Exxon's team the prior week." (Ex. 8 at 2.) The few remaining days leading into the trial—which was scheduled on an expedited basis—are entirely dedicated to trial preparation and the final pre-trial conference. The final pre-trial conference and argument on motions in limine was held on October 16. Members of the trial team will be conducting pre-scheduled witness preparation in Texas and New York on October 17 and 18. There simply is no realistic likelihood that ExxonMobil and its trial counsel can attend an in person conference with the Attorney General until after the New York trial concludes on or about November 12, 2019.[8]

The Attorney General's conduct in this case nullifies ExxonMobil's right to engage in a meaningful conference with the Attorney General, as required by Section 4. In view of the Attorney General's inequitable and calculated acts, the Court should exercise its inherent power and authority to extend the statutory time period for the conference to a date after the trial concludes on or about November 12. *See O'Coin's, Inc.* v. *Treasurer of the Cty. of Worcester*, 362 Mass. 507, 514 (1972) ("[S]ince these inherent powers have their basis in the Constitution,

[8] That ExxonMobil also has counsel in Boston does not solve the problem created by the Attorney General's flagrant effort to derail ExxonMobil's trial preparation and undermine the purpose of the opportunity to confer. Whether ExxonMobil has counsel in Boston or elsewhere does not cure the fact that the trial team, which has been the Company's counsel since the inception of the myriad legal proceedings, is unavailable as are the Company's key decision-makers. Moreover, Boston counsel has not been substantively involved in this matter for three years.

regardless of any statute, every judge must exercise his inherent powers as necessary to secure the full and effective administration of justice.") (internal citation omitted). This relief will cause no prejudice to the Attorney General or the Commonwealth because any possible claims that they may assert against ExxonMobil are preserved by the Tolling Agreement.

CONCLUSION

For these reasons, ExxonMobil respectfully requests that the Court extend its opportunity to confer with the Attorney General, afforded by G.L. c. 93A, § 4, to a date after the conclusion of the trial in the New York State action.

Dated: October 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas C. Frongillo, hereby certify that a true and correct copy of the above document was served upon the Attorney General's Office by hand on this 17th day of October 2019.

Thomas C. Frongillo